

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DONNITTA SINCLAIR,

11 Plaintiff,

v.

12 CITY OF SEATTLE,

13 Defendant.

14 CASE NO. C21-0571-JCC

ORDER

15 This matter comes before the Court on Plaintiff's objections (Dkt. No. 26) to the report
16 and recommendation ("R&R") of the Honorable J. Richard Creatura, United States Magistrate
17 Judge (Dkt. No. 25). Having thoroughly considered the R&R, the parties' briefing, and the
18 relevant record, the Court finds oral argument unnecessary and hereby OVERRULES Plaintiff's
19 objections, ADOPTS the R&R, and GRANTS Defendant's motion to dismiss (Dkt. No. 12) for
20 the reasons explained herein.

21 **I. BACKGROUND**

22 Plaintiff's suit against the City follows the tragic death of her son, Lorenzo Anderson, Jr.,
23 who was allegedly killed within the CHOP¹ by Marcel Long. The R&R sets forth the detailed
24 facts and procedural history of this case and the Court will not repeat them here. (*See* Dkt. No.

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26 ¹ The Capitol Hill Organized Protest ("CHOP") occurring from June 8, 2020 through July
1, 2020.

1 25 at 1–4.) In the R&R, Judge Creatura recommends that the Court grant the City’s motion to
 2 dismiss. (*Id.* at 10.) Plaintiff, in objecting to Judge Creatura’s recommendation, takes issue with
 3 his findings that (a) Plaintiff failed to articulate actions by the City that created a particularized
 4 danger to Mr. Anderson, Jr. within the CHOP and (b) Plaintiff’s allegations do not establish the
 5 City’s deliberate indifference to the known dangers presented to Mr. Anderson, Jr. during the
 6 CHOP. (Dkt. No. 26 at 2–3.)

7 **II. DISCUSSION**

8 **A. Legal Standard**

9 A district court reviews *de novo* those portions of an R&R to which a party objects. *See*
 10 28 U.S.C. § 636(b)(1) (2018); Fed. R. Civ. P. 72(b)(3). Objections must enable the district court
 11 to “focus attention on those issues—factual and legal—that are at the heart of the parties’
 12 dispute.” *Thomas v. Arn*, 474 U.S. 140, 147 (1985). In considering a Rule 12(b)(6) motion to
 13 dismiss, the Court must determine whether the complaint contains factual allegations that state a
 14 claim for relief that is “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 15 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
 16 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
 17 inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S.
 18 at 556). Dismissal is appropriate if the complaint fails to state a cognizable legal theory or fails to
 19 provide sufficient facts to support a claim. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622
 20 F.3d 1035, 1041 (9th Cir. 2010).

21 **B. Liability of City for Acts of Private Parties**

22 Plaintiff’s amended complaint, brought pursuant to 42 U.S.C. § 1983, asserts a
 23 Substantive Due Process claim based on the City’s failure to protect Mr. Anderson, Jr. from
 24 harm within the CHOP. (Dkt. No. 8 at 7–8.) Ordinarily, the City’s failure to prevent third-party
 25 criminal conduct cannot violate Substantive Due Process. *DeShaney v. Winnebago County Dep’t*
 26 *of Soc. Services*, 489 U.S. 189, 197 (1989). However, Plaintiff relies on the state-created danger

1 doctrine, which provides an exception to the rule. (See Dkt. No. 13 at 4–9.) Indeed, the doctrine
 2 would apply here if (1) the City’s affirmative actions created or exposed Mr. Anderson, Jr. to “an
 3 actual, particularized danger that [he] would not otherwise have faced,” (2) Mr. Long’s alleged
 4 attack was foreseeable, and (3) the City was “deliberately indifferent to the known danger” of an
 5 attack like the one Mr. Anderson, Jr. suffered. *Hernandez v. City of San Jose*, 897 F.3d 1125,
 6 1133 (9th Cir. 2018). It is undisputed, at least for purposes of Defendant’s motion, that Plaintiff’s
 7 amended complaint adequately alleges the second element. (See Dkt. No. 12 at 8 n.1.) However,
 8 Plaintiff takes issue with Judge Creatura’s recommendation that her amended complaint does not
 9 satisfy the first and third elements for a failure to prevent claim. (Dkt. No. 26 at 2–3.)

10 1. Particularized Danger

11 To withstand the City’s motion to dismiss, Plaintiff’s amended complaint must provide
 12 facts indicating that the City “affirmatively created an actual, particularized danger [that Mr.
 13 Anderson, Jr.] would not otherwise have faced” absent the City’s actions. *Kennedy v. City of*
Ridgefield, 439 F.3d 1055, 1063 (9th Cir. 2006). According to Plaintiff’s amended complaint, the
 15 City condoned the CHOP and encouraged protestors by (a) abandoning the SPD East Precinct,
 16 (b) providing additional lighting and portable public toilets, (c) modifying first responder
 17 protocols and (d) making public comments encouraging protesters to visit the area. (Dkt. No. 8 at
 18 3–6.) Judge Creatura reasoned that these acts, even if true, do not represent a particularized
 19 danger to Mr. Anderson, Jr., because none of the acts were *specific to him*. (See Dkt. No. 25 at 6
 20 (citing *Hernandez*, 897 F.3d at 1133; *Munger v. City of Glasgow Police Dept.*, 227 F.3d 1082,
 21 1087 (9th Cir. 2000); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989); *Penilla v. City of*
 22 *Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997).)

23 The cases Plaintiff cited in her opposition brief, considered by Judge Creatura, do not
 24 support her contention that his R&R erred in its analysis. (See Dkt. No. 13 at 5–6) In *Wood v.*
 25 *Ostrander*, for example, officers deliberately left a woman in a high crime area, where she was
 26 eventually attacked. See 879 F.2d 583, 586 (9th Cir. 1989). Similarly, in *L.W. v. Grubbs*, prison

1 supervisors knowingly assigned a nurse to work alone with a violent sex offender. *See* 974 F.2d
 2 119, 120 (9th Cir. 1992). Plaintiff also cites *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982),
 3 in her objection brief. (*See* Dkt. No. 26 at 2.) But in that case the court *upheld* a lower court
 4 decision dismissing a failure to protect claim for much the same reason Judge Creatura
 5 recommends dismissal here. *See Bowers*, 686 F.2d at 619.

6 Nor does the Court find *Hunters Capital LLC v. City of Seattle*, 499 F. Supp. 3d 888
 7 (W.D. Wash. 2020), particularly relevant, given the distinguishable facts. In that case, the
 8 plaintiffs lived and worked within the CHOP; they were not there by choice. *See* Case No. C20-
 9 0983-TSZ, Dkt. No. 9 (W.D. Wash 2020). Moreover, the complaint alleged the City instituted an
 10 affirmative policy of not responding to property damage calls. *Id.* This is meaningfully different
 11 from Plaintiff's allegation of a modified operation plan focused on protecting the health of
 12 protestors *and* first responders. (*See* Dkt. No. 8 at 3–6.) If anything, the facts presented in
 13 Plaintiff's amended complaint are more analogous to *Johnson v. City of Seattle*, where the Ninth
 14 Circuit affirmed the dismissal of claims brought by Mardi Gras revelers who were injured in
 15 attacks by private parties. *See* 474 F.3d 634, 639–41 (9th Cir. 2007).

16 Accordingly, the Court FINDS that Judge Creatura did not err in concluding that Plaintiff
 17 "has not alleged facts to support her claim that the City created an actual, particularized danger
 18 for Mr. Anderson." (Dkt. No. 25 at 7.)

19 2. Deliberate Indifference

20 While the finding above is sufficient to dismiss Plaintiff's amended complaint, the Court
 21 will also address Plaintiff's objection to Judge Creatura's recommendation that the complaint
 22 fails to allege the requisite deliberate indifference. (*See* Dkt. Nos. 25 at 7–9, 26 at 3.)

23 According to the amended complaint, it took first responders 20 minutes to enter the
 24 CHOP following the shooting. (*Id.*) Even reading Plaintiff's allegations in the light most
 25 favorable to her, the need for time to organize, given what she alleges was "the crowd's
 26 hostility" towards the SPD, does not reflect a deliberate indifference toward Mr. Anderson Jr.'s

welfare. (*Id.* at 5.) Rather, it suggests an equal concern for the welfare of the first responders. Moreover, Plaintiff's allegation that the delay was due, in part, to "[m]iscommunication" between first responders, (*id.*), also prevents her from establishing that any indifference was deliberate. *See Patel vs. Kent School District*, 648 F.3d 965, 974 (9th Cir. 2011) ("[T]he standard we apply is even higher than gross negligence—deliberate indifference requires a culpable mental state.").

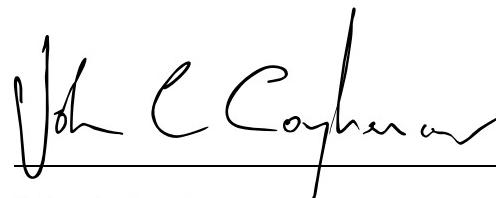
Accordingly, the Court FINDS that Judge Creatura did not err in finding that Plaintiff's amended complaint failed to adequately plead facts supporting allegations of a deliberate indifference to Mr. Anderson Jr.'s welfare.

III. CONCLUSION

For the foregoing reasons, the Court hereby FINDS and ORDERS as follows:

1. Plaintiff's objections (Dkt. No. 26) to the R&R are OVERRULED;
2. The Court APPROVES and ADOPTS the R&R (Dkt. No. 25);
3. Defendant's motion to dismiss (Dkt. No. 12) is GRANTED and Plaintiff's complaint is DISMISSED with prejudice; and
4. The Clerk is DIRECTED to send a copy of this order to Judge Creatura.

DATED this 1st day of November 2021.



John C. Coughenour
UNITED STATES DISTRICT JUDGE